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## Efficiency Unbound: Processual Deterrence for a New Legal Realism

Riaz Tejani

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# Efficiency Unbound: Processual Deterrence for a New Legal Realism

Riaz Tejani\*

*Optimal deterrence theory seeks to promote resource maximization by identifying the most economically useful occasions and magnitudes for legal liability. But liability is only the final outcome of a burdensome process made more onerous for many today by widening inequalities in wealth and access to justice. Omission of this may reflect a preoccupation among tort theorists with large corporate actors and a drift further from the dilemmas of individual and social justice. Select lessons from American Legal Realism prompt us to go beyond liability to think about the deterrent function of legal process itself. These lessons challenge us to consider the interpretive dimension of human behavior in its response to not only norm enforcement but also threats thereof. Taking up that challenge, this Article suggests that considerations of optimal deterrence should account for the behavioral impact of what it terms the “specter of process,” in other words the fear of litigation itself, and that doing so requires a stronger bridge between economic and interpretive empirical studies of law. The revised theory may be said to include processual deterrence, the degree to which the behavior of legal subjects is shaped ex ante by fears of being implicated in the burdens of litigation.*

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## INTRODUCTION

Optimal deterrence theory, even under its own stated objectives, stands to benefit from embracing an interpretive, behaviorist approach inspired by the classic American Legal Realists. Until now, optimal deterrence, formed within a law and economics framework, has emphasized the deterrent impact of legal liability in shaping future behavior.<sup>1</sup> Liability, meanwhile, has become just one of several sources of coercion supporting social control and inducing behavioral compliance.<sup>2</sup> Legal process, the formal steps by which parties seek out or evade liability, has itself become increasingly burdensome on individual and small corporate actors.<sup>3</sup> This has become more apparent as problems in access to justice are increasingly identified across our legal system.<sup>4</sup> Therefore, the *specter of process*, I suggest, may be just as important in achieving deterrent impacts as the heretofore dominant *specter of liability*.

To study this, a revised behaviorist approach may be crucial. Whereas law and economics scholars have espoused a certain kind of behaviorism, theirs is by design a schematic one that presupposes rational minds operating in individual fashion throughout an atomized social environment.<sup>5</sup> This use of behaviorism may have been partly inspired by the Realist writers of the early twentieth century, but a different version of behaviorism—an interpretive one further influenced by the cultural anthropology of the intervening years—is further necessary to assimilate the specter of process into a theory of optimal deterrence.<sup>6</sup> Taking into account the contemporary specter of process, that revised theory may be said to include *processual*

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1. See Brittan J. Bush, *The Overlooked Function of Punitive Damages*, 44 RUTGERS L.J. 161, 171–73 (2014).

2. See Matthew C. Stephenson, *Legal Realism for Economists*, 23 J. ECON. PERSP. 191, 191–92 (2009).

3. I distinguish between small and large corporate actors insofar as the burdens of litigation—already distributed unevenly through adhesion contracts in some cases—impact individuals and small businesses differently than they do large, multinational corporations.

4. See DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004).

5. See Stephen R. Galoob & Adam Hill, *Norms, Attitudes, and Compliance*, 50 TULSA L. REV. 613, 622–23 (2015).

6. See Stephenson, *supra* note 2, at 196 n.4. But see BRIAN LEITER, *NATURALIZING JURISPRUDENCE* 54 (2007) (quoting Richard Posner on the incommensurability of Realism and his economic theory of justice).

*deterrence*, the degree to which the behavior of legal subjects may be shaped *ex ante* by the fear of simply being implicated in the burdensome process of litigation.<sup>7</sup>

Grasping processual deterrence demands understanding what legal decisions and rules mean to the people they influence. The social scientific approach most associated with meaning has been called “interpretivism.” Interpretivism is a subset of behaviorism borrowed from cultural anthropology.<sup>8</sup> To its critics, it is simply the “reading” of social symbols and cues from afar.<sup>9</sup> But to its adherents this is a caricature; for them an interpretive approach is the only way to access knowledge of how the world, legal or otherwise, appears “Real” to its inhabitants.

For the Realists, the value of interpretation was becoming apparent in the interwar period.<sup>10</sup> Llewellyn, for example, acknowledged the notion that “facts” about law and legal systems required proper framing by legal academics who could improve their accuracy through fieldwork.<sup>11</sup>

Arguing for the embrace of this intellectual lineage, Part I of this Article examines the thinking behind optimal deterrence, including the larger law and economics preoccupation with defining social utility as “wealth maximization.” Part II then questions the primacy of liability as the inaugural moment in the behavioral influence of tort litigation. In Part III, the discussion turns to legal process as another possible symbolic fixture in the minds of impacted legal subjects. Part IV then explores the study of this fixture by first examining the behavioral assumptions underlying current optimal deterrence theory, then looking to the precedent behaviorism of the classic Legal Realists, and finally illustrating the ways in which certain extralegal disciplines have conceived of behavioral studies. Part V then offers a roundup of key implications from considering processual deterrence, and Part VI attempts to draw these sections into a coherent closure.

## I. OPTIMAL DETERRENCE?

Optimal deterrence is one of several competing policy “functions” of American tort law.<sup>12</sup> Scholars disagree about the number, validity, and relationship among these various functions, and the precise meaning of “function” itself is open to substantial disagreement.<sup>13</sup> For instance, does any given policy function explain the way judicial decisions *are* actually reached, or does it explain the governing logic by which such decision *should be* reached? Some would describe this opposition as

7. See *infra* Part II.

8. See *id.* at 16–17, 20; see also CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURES: SELECTED ESSAYS BY CLIFFORD GEERTZ 16–17, 20 (1973).

9. See *id.* at 16–17.

10. See Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930), reprinted in AMERICAN LEGAL REALISM 53, 55–56 (William W. Fisher III et al. eds., 1993).

11. See *id.* at 57–58.

12. KENNETH ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 16–23 (4th ed. 2012).

13. *Id.*

one between tort policy's positive and normative modalities.<sup>14</sup> Further, as Kenneth Abraham has said,

Although much of modern tort law scholarship has been concerned with analysis of and debate about the nature and proper functions of tort law, they remain contested. Some scholars argue that tort law is, and should be, rights-based . . . . Others see tort law's function as more instrumental . . . . And still others see tort law as a mixed system that performs a combination of these and other functions.<sup>15</sup>

Among the rights-based approaches Abraham identifies are *corrective justice* and *civil recourse*.<sup>16</sup> Corrective justice theory says that tort disputes should be resolved with an eye for correcting the moral imbalance resulting from nonreciprocal harm creation—as in the case of a car accident caused by the fault of one driver alone.<sup>17</sup> Civil recourse theory says that tort law should be primarily concerned not with *righting* social wrongs but rather with securing the right of all individuals equally to pursue a civil claim in the appropriate forum should they determine this to be necessary given the harm they have suffered.<sup>18</sup> In these two conceptions, tort law protects a *right*, whether it is to correction itself, or to the pursuit of correction.

In addition to rights-based approaches, scholars have identified instrumentalist functions of tort law that, loosely speaking, pursue broader social goals such as distributional equality or social control.<sup>19</sup> In the former category are the policy functions of *loss distribution*, *compensation*, and *social justice*.<sup>20</sup> Loss distribution, supported by key jurists like William Traynor of the Supreme Court of California during the advent of strict products liability, holds that tort disputes should be resolved in a way to spread the costs of harm generated across the “cheapest cost avoider”—the institutional or social entity that can most easily absorb its burdens.<sup>21</sup> The compensation and social justice functions, meanwhile, tend to be downplayed.<sup>22</sup> Although their principles appeal most to the lay public and left social activists in their apparent rectification of injury and historical or structural inequalities, tort scholars have frequently emphasized that the “system” is not designed to remedy such problems.<sup>23</sup> Moreover, these scholars say that doing so would be simply “inefficient.”<sup>24</sup>

Optimal deterrence, meanwhile, is the policy function of torts perhaps most preoccupied with social control. Its goal is to steer individual behavior towards what

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14. See *id.* at 16–17.

15. *Id.* at 17.

16. *Id.* at 17–18.

17. *Id.*

18. *Id.* at 18.

19. *Id.* at 18–23.

20. *Id.*

21. See *id.* at 19–20; see also Donald G. Gifford, *Death of Causation: Mass Products Torts' Incomplete Incorporation of Social Welfare Principles*, 41 WAKE FOREST L. REV. 943, 975 (2006).

22. See *id.* at 21–22.

23. *Id.* at 22–23.

24. *Id.* at 22.

its proponents consider the most efficient use of social resources.<sup>25</sup> It is, in other words, social control for wealth maximization.

#### A. Deterrence

Deterrence is a supremely powerful idea.<sup>26</sup> It allows law to move between the normative registers of *ought* and *is*, registers Karl Llewellyn called for the separation of in his vision of a realistic jurisprudence.<sup>27</sup> When we identify or create a rule to govern behavior, we say that this is how one “ought to” or “should” behave. Persons under the common law of torts, for instance, should act in ways that minimize harm to themselves even after being injured by another person.<sup>28</sup> But when we want to assess whether this rule is effective, whether it influences behavior, we must move into the descriptive realm of “is.” We say, for example, that people have been mitigating their losses ever since the above rule took effect. If this statement is true, then the rule above has had an observable deterrent effect. Justice Holmes emphasized this distinction early in his “bad man” theory of law articulated first in 1897.<sup>29</sup> “[I]f we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind.”<sup>30</sup> Under the “bad man” theory, deterrence is only a result of effectively applied or enforced law.<sup>31</sup>

Since Holmes’ day, globalization has undoubtedly stretched the enforceability of legal norms. In global legal “communities” whose populations may now range beyond one billion people, law has the onerous task of controlling behavior and ordering populations without generally setting foot on real property, or laying a hand on real persons. Without this capacity of distanced ordering, law in these systems would be overburdened, ineffectual, and perhaps above all negligible. Or, as Llewellyn once wrote, “Law’ without effect approaches zero in its meaning.”<sup>32</sup> The deterrence function, therefore, appears to grow in importance with modernization. Increasingly, it gives law the efficiency to discipline growing and complexifying populations without practical administration of expensive punishment or liability.

25. *Id.* at 18–19.

26. See Roscoe Pound, *What is Law?*, in *SOCIAL CONTROL THROUGH LAW* 35, 52 (2d ed. 1997) (“Austin and Maine taught that it is a habit of obedience on the part of people generally, a phase, perhaps, of that control over internal nature which is half of civilization, making it unnecessary to apply force except in a relatively small number of the controversies which arise in daily life and to the conduct of a relatively small proportion of the population.”).

27. Karl N. Llewellyn, *Some Realism About Realism*, 44 *HARV. L. REV.* 1222, 1235–37 (1931).

28. See *RESTATEMENT (SECOND) OF TORTS* § 19 (AM. LAW INST. 1965).

29. See Oliver Wendell Holmes, J. of the Supreme Judicial Court of Mass., *The Path of the Law*, Address at the Dedication of the New Hall of the Boston University School of Law (January 8, 1897), in 10 *HARV. L. REV.* 457, 459–61 (1897).

30. *Id.* at 460–61.

31. See *id.* at 460.

32. Llewellyn, *supra* note 27, at 1249.

### B. *Optimal I: Levels of Control*

But the question will always be precisely how much deterrence is appropriate. Attempting to answer this question, law and economics scholars have long spoken of *optimal deterrence*, the concept under which law's discouragement of harmful or risky behavior should always maximize "social utility."<sup>33</sup> Here, there is a major difference between utility construed as happiness and utility construed as wealth maximization. The former, inherited from Jeremy Bentham, emphasizes aggregate pleasure while the latter emphasizes aggregate material resources.<sup>34</sup> According to Richard Posner, law and economics critics have too often confused social utility with wealth maximization.<sup>35</sup>

In order to maximize wealth, deterrent norms—norms that discourage risk and encourage precautions—must be balanced with wealth creation.<sup>36</sup> The limit on deterrence, theorists suggest, should be placed at precisely the point at which social benefits from engaging in the activity can still outweigh social costs incurred from all its harms.<sup>37</sup> Put otherwise, the aggregate costs of behavioral precaution or avoidance should not outweigh the aggregate benefit derived from the reduction in harms. In one illustration of this, automobile driving is considered a highly risky activity—one that brings a chance of death of one in eighty-four over the average lifetime of a human.<sup>38</sup> And yet, despite this high risk, one that exceeds that of suicide,<sup>39</sup> drowning,<sup>40</sup> and shark attacks,<sup>41</sup> we do not entirely ban the activity, or introduce safety measures that would make car ownership expenses prohibitive. Such measures would obliterate wealth-generating uses of driving that include everything from interstate commerce to workplace commuting to tourism. For law and economics thinkers, the current net benefits of driving are positive, and such cost prohibitive measures would be considered "overdeterrence."<sup>42</sup> Instead, we impose on automobile manufacturing, licensing, and driving a number of

33. Benjamin Shmueli, *Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice*, 48 U. MICH. J.L. REFORM 745, 754 (2015).

34. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 48–49 (1981).

35. *Id.* at 49.

36. Shmueli, *supra* note 33, at 756.

37. *Id.*

38. See WARD FARNSWORTH & MARK F. GRADY, *TORTS: CASES AND QUESTIONS* xlv (2d ed. 2009) ("The goal of the legal system, on this view, should be to keep to a minimum the *combined* costs of precautions, accidents, and litigation. Sometimes this will mean that the law should try to induce people to take more precautions than they do; sometimes it will mean that people take too many precautions already, or that it is too costly to use the legal system to try to change their behavior. The rules of tort law thus should give people incentives to take precautions that are efficient—i.e., cost-justified: precautions that prevent injuries more costly than the precautions but that allow injuries to occur if they are less costly than the precautions.") (emphasis in original); see also Tara Parker-Pope, *How Scared Should We Be?*, N.Y. TIMES: WELL BLOG (Oct. 31, 2007, 3:19 PM), <http://well.blogs.nytimes.com/2007/10/31/how-scared-should-we-be/> [https://perma.cc/XUB6-AENU].

39. See Parker-Pope, *supra* note 38.

40. See *id.*

41. See *id.*

42. See POSNER, *supra* note 34, at 70.

restrictions intended not to eliminate it but to make it marginally safer. With these additional burdens—for example, the seat belts introduced in the 1960s after vigorous advocacy by activists like Ralph Nader<sup>43</sup>—driving becomes more expensive, but not so much so that its wider benefits are outweighed.

While the seat belt laws that emerged in that era were federal and regulatory in nature, other auto industry safety measures have been shaped by common law litigation.<sup>44</sup> There, individual cases that have emerged by the thousands have literally chipped away at the once under-regulated activities of car manufacturing and driving to shape industry and individual behaviors through both the imposition of liability and the real, imminent threat thereof.<sup>45</sup> In the case of the individual automaker or individual driver found culpable for causing a plaintiff's harm, the imposition of liability has an immediate effect that many in criminal law would call "specific deterrence."<sup>46</sup> But in the case of the many more actors not immediately held liable, a single outcome can cause a change of behavior through what is often called "general deterrence."<sup>47</sup>

When law and economics scholars of tort law speak about optimal deterrence, they are typically referring to its capacity for general deterrence.<sup>48</sup> How, they ask, will liability in this particular case—assuming *this* plaintiff receives the kind of remedy he or she is claiming—impact not just this defendant, but his or her *entire* community or industry?<sup>49</sup> In first-year courses, law professors often point to the seminal 1932 Second Circuit case *T.J. Hooper*, in which a group of tugboats and their barges were lost at sea off of the New Jersey coast in part because their owner had not equipped them with weather radios.<sup>50</sup> In an opinion fifteen years prior to the famous *Carroll Towing* case, Judge Learned Hand wrote that the absence of weather radios from most tugs within the local industry—evidence of industry custom—did not prove the reasonableness of such an omission.<sup>51</sup> In short, *T.J. Hooper* established that in some cases, a jury may find that an entire industry is unreasonable in its conduct and thereby impose the widespread expense of technological upgrades

43. See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 124–131, 206–210 (1990), for a discussion of Ralph Nader's role in the development of seat belt requirements.

44. See AM. ASS'N FOR JUST., *DRIVEN TO SAFETY: HOW LITIGATION SPURRED AUTO SAFETY INNOVATIONS* (2010), [https://www.justice.org/sites/default/files/file-uploads/Driven\\_to\\_Safety.pdf](https://www.justice.org/sites/default/files/file-uploads/Driven_to_Safety.pdf) [<https://perma.cc/4JY5-PWXN>].

45. *Id.*

46. See, e.g., Dustyn Coontz, *Beyond First Blush: The Utility of Shame as a Master Emotion in Criminal Sentencing*, 2015 MICH. ST. L. REV. 415, 436 (2015).

47. *Id.* at 437.

48. See Guido Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656, 657–58 (1974–75); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 870, 877 (1998).

49. See, e.g., Polinsky & Shavell, *supra* note 48, at 877 ("By deterrence, we mean what is often called *general deterrence*, namely, the effect that the prospect of having to pay damages will have on the behavior of similarly situated parties in the future (not just the behavior of the defendant at hand)").

50. *T.J. Hooper v. N. Barge Corp.*, 60 F.2d 737 (2d Cir. 1932).

51. *Id.* at 740.



across the board.<sup>52</sup> In the average case, however, a finding of liability may have nothing to do with industry custom and may rather pertain only to *individual* acts of questionable reason. In such cases, findings for the plaintiff may not automatically alter community behavior, but they do impose the specter of liability in future similar cases.

And yet, the *specter of liability* is only one possible influence on prospective defendant behavior. A second is one this Article calls the *specter of process*. Under the specter of process, prospective defendants, or risk-generating actors, may make decisions not only with the threat of liability factored into judgments about action, but also with the threat of litigation itself in mind. The difference between these two variables, although apparently slight from a distance, may be significant “up close.” The specter of liability—the threat of being held liable for damages in a tort case—is quite narrow in most cases.<sup>53</sup> It indicates to a prospective defendant that, given a measure of risk-generating activity of uncertain reasonableness, he or she might be forced to compensate any injured party.<sup>54</sup> Such prospective compensation may be small in comparison to the economic value of the activity engaged in, or it may be already “internalized”—prospectively factored into operating budgets—by the individual or enterprise engaging in the conduct.<sup>55</sup> In either case, the specter of liability is simply the fear of legal liability, taking into account the likelihood of a failed legal defense.

The specter of process is a much wider field of possibility. There, actors carry out conduct thinking not of potential ultimate liability, but the burdens and likelihood of litigation in and of itself. They effectively ask themselves, “Even if I am certainly not blameworthy for any harm this creates, how likely is it that I will be required and able to show this to a judge or jury?” Consideration of this variable in judgments about socioeconomic activity also takes into account possibilities for successful defense at any number of procedural levels within the civil process.<sup>56</sup> The actor may or may not have confidence in victory at the demurrer stage, at the summary judgment stage, on directed verdict, and so on. Regardless of these intermediary options for victory, the overarching question is simply how much a

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52. The difference between a “jury may find” and a “jury must find” is very significant and indicates that even findings that may raise the specter of liability are no guarantee that they will consistently make good on this. *See, e.g.,* FARNSWORTH & GRADY, *supra* note 38, at xlv–xlv.

53. *See* John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820, 1834 (1986–87) (“Specifically, while the efficacy of tort law depends on the imposition of full liability on all actors for their torts, the keystone of both corporate and bankruptcy law is the ability of firms, under some circumstances, to avoid paying all or part of their liabilities.”).

54. *See id.* at 1826 (“Similarly, if a manufacturer simply cannot predict with any degree of certainty what its liability costs will be, it may forego safety-related expenditures that by hindsight would have been unquestionably rational.”).

55. *See id.* at 1825 (discussing the internalization of liability cost into a business’s operating budget).

56. *See* Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39, 48 (2008) (explaining that various motions can end a case at different stages in the litigation).

legal defense of an actor's conduct will cost given both the likelihood of harm that it may create, and the legal response by prospective plaintiffs.<sup>57</sup> To the extent that either the specter of liability or the specter of process has a normative influence on risk-generating actors, both play a significant role in tort law's deterrence function.<sup>58</sup> But, with legal academic focus upon case law and damages, the extant scholarship has focused more on liability than process.<sup>59</sup>

### C. *Optimal II: Law and Economics*

Law and economics scholars believe that legal dispute resolutions should generally serve the purpose of wealth maximization.<sup>60</sup> To the extent economic theories of justice in tort law are concerned with social interests broader than individual litigant outcomes, they have been described as embracing a "public law" or "regulatory" approach to the civil justice system.<sup>61</sup> This approach, at least within some academic circles, has nearly supplanted a once-accepted "private law" approach that saw torts as serving primarily the needs of individual claimants in singular disputes.<sup>62</sup> The public law functions of tort law push *stare decisis*—the common law concept of "precedent" observed in British and American systems—to a communal level by emphasizing the normative impact, not only upon similarly situated litigants in future cases, but also upon similarly situated actors in social and industrial life.<sup>63</sup>

Two main proponents of this approach, Richard Posner and Guido Calabresi, were both prominent legal scholars who went on to become revered federal appellate judges. These jurists introduced the theoretical propositions on which law and economics approaches to tort law would be based. They were followed by empirical scholars, primarily economists, who sought to test and support the notion that civil liability was best assessed in terms of social utility.<sup>64</sup>

57. See Siliciano, *supra* note 53, at 1825 (explaining that the cost of litigation is tied to the inherent riskiness of behavior).

58. Shmueli, *supra* note 33, at 754–55 (stating that the threat of litigation and liability perform a deterrence function in the context of tort law).

59. See, e.g., David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002) (discussing the economics behind deterrence and liability for mass torts); Shmueli, *supra* note 33, at 754–55 (explaining that defendants shift behavior based on their predictions of liability); Siliciano, *supra* note 53, at 1825 (focusing on the deterrent effects of tort liability on corporate behavior).

60. POSNER, *supra* note 34, at 48.

61. Riaz Tejani, *National Geographic: Toward a "Federalism Function" of American Tort Law*, 51 SAN DIEGO L. REV. 81, 84 (2014).

62. *Id.* at 87–88.

63. FARNSWORTH & GRADY, *supra* note 38, at xlvii–xlviii ("In the view of the first camp of scholars [optimal deterrence], the most important aspect of a court's decision in a tort case is the impact it will have on the behavior of others in the future. The most prominent advocates of this view are economists who believe that the purpose of tort law should be to minimize the costs of accidents. Every accident or other tort creates costs for its victims; but precautions against accidents are expensive, too—as are lawsuits afterwards.").

64. *Id.*

It is important to reiterate that the social utility approach is not itself antithetical, and may instead be derivative of classic Legal Realist thought.<sup>65</sup> On one level, Realism, as envisioned by Llewellyn and others, is a “consequentialist” approach to jurisprudence.<sup>66</sup> It asks, as in Holmes’s “bad man” theory above, not simply what the formal doctrine says, but how it is used in practical ways to promote one or another idea of a just society.<sup>67</sup> Law and economics, meanwhile, fills in the criteria for assessing justice with a simple economic question: How can law maximize social resources?<sup>68</sup>

Importantly, though, this formulation of “social” is not the same as “public.” Although it constitutes a largely “public law” approach to tort outcomes, law and economics is concerned with wider social conduct and not strictly public resource maximization.<sup>69</sup> Indeed, under its dominant conception, private wealth maximization is just as important as the commons, and it therefore can be equally well served by decisions that favor an elite so long as doing so contributes to an aggregate conception of what social resources are.<sup>70</sup> In other words, distributional inequality remains acceptable until it interferes, for instance by resulting in higher crime, with the wealth maximization goal.<sup>71</sup> The ultimate irony of this approach, then, is that it can *publicize* private resources while effectively *privatizing* public ones.<sup>72</sup>

But, for quite a few scholars, the law of torts is (still) a moral enterprise requiring something more than economic consequentialism. Ward Farnsworth and Mark Grady capture well the dichotomy between economic and moralistic approaches to tort doctrine:

Economists often regard theories of corrective justice as mush . . . Moral theorists are known to dismiss the economic approach on grounds of their own: skepticism about whether people have the knowledge and rationality to be deterred by tort law in the way that economists suggest, and rejection of efficiency as a morally appealing goal for the legal system.<sup>73</sup>

Moralist scholars may be further divided into two groups: those who would advocate the deontological, moral implications of torts adjudication, and those who

65. Stephenson, *supra* note 2 at 200–01.

66. See *id.* at 201 (Llewellyn’s discussion of consequentialist jurisprudence).

67. Holmes, *supra* note 29, at 459; see also Stephenson, *supra* note 2, at 201.

68. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 995 (2001).

69. *Id.* at 1050.

70. See e.g. Tseming Yang, *Balancing Interests and Maximizing Rights in Environmental Justice*, 23 VT. L. REV. 529, 529–30 (1999) (discussing the disparate impact of utilitarian principles on environmental justice for minority groups).

71. RAYMOND A. BELLIOTTI, JUSTIFYING LAW: THE DEBATE OVER FOUNDATIONS, GOALS, AND METHODS 120–21 (1992) (explaining Posner’s argument that wealth inequality is acceptable unless it interferes with the larger wealth maximization goal).

72. Although some, including certain Realists, were against public/private distinctions, the blurring of these boundaries is illusory and may be part of the larger discourse of neoliberalism. David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS., 2014, at 16.

73. FARNSWORTH & GRADY, *supra* note 38, at xlvii.

would argue that the moral framework torts help to construct is itself an important consequentialist goal.<sup>74</sup>

A major question that emerges in this debate is whether or not economic determinism can itself be considered a moral theory.<sup>75</sup> Already in the eighteenth and nineteenth centuries, debates over utilitarianism dramatized this very question. Writing in his 1789 Introduction to the *Principles of Morals and Legislation*, Jeremy Bentham argued that utilitarianism, the promotion of pleasure over pain, *was* a moral philosophy.<sup>76</sup> In his 1863 response to critics of Bentham, John Stuart Mill elaborated that considerations in defining “pleasure” and “pain” are precisely what give utilitarianism its moral dimension.<sup>77</sup> It becomes clear from this line of texts that the moral dimension of the utility principle is not in fact internal to the calculus about happiness itself, but rather located in the separate enterprise of valuation and value exchanges that ultimately get plugged into the cost-benefit analysis espoused by some.<sup>78</sup>

But focus upon the separation of economy and morality has forestalled a rigorous conversation between partisans of social primacy and partisans of economic primacy. What is needed is a social approach that provisionally embraces economism and looks for ways its valuations might gain more nuance through social theory. As suggested below, an embrace of the behavioral sciences, as advocated by certain Legal Realists but updated to account for interpretivism, may be such an approach.

## II. THE SPECTER OF LIABILITY

Optimal deterrence theorists have focused primarily upon the deterrent function of civil *liability*.<sup>79</sup> By this, I mean simply the determination at any given stage of the legal process that the defendant shall be made to pay for the victim’s injury. While in cases of negligence this succeeds a determination of blameworthiness, in cases of strict liability it does not. As Posner has famously said, the aptitude of optimal deterrence theory is confirmed by the observation that findings of “fault” graph neatly onto societal attitudes about resource wastefulness.<sup>80</sup> In other words, the person who crashes a car after turning ninety

74. See, e.g., Thomas S. Ulen, *Law and Economics, the Moral Limits of the Market, and Threshold Deontology*, in *LAW AND ECONOMICS: PHILOSOPHICAL ISSUES AND FUNDAMENTAL QUESTIONS* 214 (Aristides N. Hatzis & Nicholas Mercuro eds., 2015) (explaining the different perspectives of deontologists and consequentialists in tort theory).

75. See e.g. Richard Posner, *supra* note 34, at 65–67.

76. Jeremy Bentham, *Principles of Morals and Legislation*, in *JUSTICE: A READER* 9, 10 (Michael J. Sandel ed., 2007).

77. See John Stuart Mill, *Utilitarianism*, in *JUSTICE: A READER* 14, 20–23 (Michael J. Sandel ed., 2007).

78. It is interesting to consider that this may result, in part, from the same ambiguity of utilitarianism as fundamentally about *happiness* on one hand or *wealth* on the other.

79. See Calabresi, *supra* note 48, *passim*; Cass R. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237 *passim* (2000).

80. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33–34 (1972).

degrees to look at a momentary sunset should be liable because no amount of pleasure gained from the sunset is greater than the cost of injury and repair to himself or another driver. More importantly, society supposedly intuitively does this.<sup>81</sup> Different from fault liability, meanwhile, strict liability is a doctrine permitting liability for certain activities irrespective of the levels of care applied in their execution. Findings of strict liability are justifiable when the cost of harms inflicted under the greatest exercise of care can be more efficiently shouldered by the enterprises engaged in risky activity, such as product manufacturing and distribution, in some cases, or high-risk explosive demolition in others.<sup>82</sup>

The emphasis on liability might be explained in two opposing ways. In the first, we might consider optimal deterrence a response to prior iterations of American tort theory. As John Goldberg reminds us, torts were initially a matter of clear private law whose purpose was to settle disputes between individual parties and repair some form of moral imbalance between them.<sup>83</sup> For this purpose, what mattered most were dispute outcomes: not dispute processing. Although, conceivably, plaintiffs may have felt some sense of restorative justice simply from seeing their injurer tied up in legal proceedings, the costs of litigation could be burdensome on both parties, and therefore reciprocal in their informal punitive effects.<sup>84</sup> To be sure, equitable remedies such as a public apology have long been available, but to be legally enforceable even these require final determination of something like liability.<sup>85</sup> And so, a finding of liability was traditionally the “end game” of tort law in its customary, private law modality. The later emergence of public law tort theories reinforced this focal point.<sup>86</sup> In one respect, the discourse of modern tort law had already been established by the mid-twentieth century when key scholars like Coase, Calabresi, Traynor, Prosser, and others began having greatest impact.<sup>87</sup>

But, under a second possible explanation, optimal deterrence as a dominant public law theory has itself been immanently forward looking in its approach. Posner, offering in 1972 his widely cited interpretation of Judge Learned Hand’s approach to the negligence standard, styled the approach as one seeking out the most efficient balance between tolerating risky conduct and mandating untaken safety precautions.<sup>88</sup> Negligence, Hand himself said, according to Posner, was only present when the tortfeasor had eschewed a precaution whose cost was less than

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81. *Id.*

82. *See, e.g.,* *Welge v. Planters Lifesavers Co.*, 17 F.3d 209, 212 (7th Cir. 1994); *Sullivan v. Dunham*, 55 N.E. 923, 924 (N.Y. 1900).

83. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 522–523 (2003).

84. *See* Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIAMI L. REV. 111, 134 (1991–92).

85. *See* Robyn Carroll, *Apologies as a Legal Remedy*, 35 SYDNEY L. REV. 317, 318 (2013).

86. *See* Goldberg, *supra* note 83, at 524.

87. *See, e.g.,* Robert G. Berger, *The Impact of Tort Law Development On Insurance: The Availability/Affordability Crisis And Its Potential Solutions*, 37 AM. U. L. REV. 285, 287, 291 (1987–88).

88. *See* Posner, *supra* note 80, at 32–33.

the aggregate (likelihood and size) of the cost of harms it was meant to avoid.<sup>89</sup> The idea behind this interpretation of negligence, we were further told, was to maximize social efficiency, understood as wealth, *moving forward*.<sup>90</sup> Liability, for this reason, remained the focus because it was the definitive pronouncement that would finalize a solution to each applied version of the Hand calculus.<sup>91</sup> It was, in short, one necessary predicate to the conclusion that marginal risks would be efficiently deterred moving forward.<sup>92</sup> Liability, then, was the key feature of the predictive power of the torts-as-public-law approach.

### III. PROCESS

Today, two developments make the ongoing focus on liability increasingly unwise. The first is a growing gap in access to justice, making legal representation, particularly in low-value plaintiff actions and many defense cases, unaffordable and thus impossible.<sup>93</sup> That social behavior among segments of the society influenced by these developments would not be adjusted to account for these facts seems implausible.<sup>94</sup> Second, there may be increased (if distorted) public awareness about the process of litigation.<sup>95</sup> As evident in more frequent public culture portrayals of lawyers, judges, courtroom, and litigants, average nonlawyers are increasingly exposed to certain aspects of legal process.<sup>96</sup> While the accuracy of these portrayals is worth questioning, the fact of their increased circulation is sufficient reason to suspect that people may be more likely to act with them in mind.<sup>97</sup> To access them, all that is required is a television, computer, or web-enabled smartphone.

#### A. *The Burdens of Process: Access to Justice and Public Culture*

The significance of process is heavily colored by problems of extreme economic inequality in the United States today. By recent reports, 20 percent of all wealth in the United States is now concentrated in the hands of “top” 0.1 percent of the population.<sup>98</sup> Meanwhile, the “bottom” 50 percent of American households

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89. *Id.*

90. *See id.* at 33–34.

91. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

92. *Id.*

93. *See* Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1040–41 (2006).

94. *See* CIV. LEGAL JUST. COALITION, TOWARD EQUAL JUSTICE FOR ALL: REPORT OF THE CIVIL LEGAL JUSTICE COALITION TO THE PENNSYLVANIA STATE SENATE JUDICIARY COMMITTEE 36–37 (2014) (finding a significant connection between funding civil legal aid and increased social and economic benefits in Pennsylvania).

95. *See* Kimberlianne Podlas, *Impact of Television on Cross-Examination and Juror “Truth,”* 14 WIDENER L. REV. 483, 494 (2009).

96. *See id.*

97. *See id.* at 493 (noting that “[n]inety-eight percent (98%) of U.S. households own a television, making it our most pervasive medium.”).

98. Jordan Weissmann, *The Shocking Rise of Wealth Inequality: Is it Worse Than We Thought?*, SLATE: MONEYBOX BLOG (Apr. 2, 2014, 4:14 PM), [http://www.slate.com/blogs/moneybox/2014/04/02/wealth\\_inequality\\_is\\_it\\_worse\\_than\\_we\\_thought.html](http://www.slate.com/blogs/moneybox/2014/04/02/wealth_inequality_is_it_worse_than_we_thought.html) [<https://perma.cc/U6A9-HM74>].

possesses only 2.5 percent of all available wealth.<sup>99</sup> The ability to absorb the costs of legal action, therefore, has changed, but this change is itself differential. The “marginal” value of money has decreased for the wealthiest among us, and increased for the poorest.<sup>100</sup> Further still, that wealth disparity accompanies a documented inequality in “access to justice.”<sup>101</sup> As several writers have already noted, while popular narratives decry the overabundance of attorneys nationwide, some 80% of poor Americans cannot access an attorney for basic needs.<sup>102</sup> What all this means, in short, is that obtaining representation for oneself in court—long before any finding of liability—is increasingly troubling for many among us.<sup>103</sup> For that group, simply being named in a lawsuit may signify approximately the same thing as being ultimately held liable.<sup>104</sup>

For a neighboring segment of the population, middle-class individuals for instance, legal defense on the merits may be possible but still burdensome thanks to several aspects of the litigation process in the current historical moment.<sup>105</sup> This moment, which some have referred to as “late” modernity, is characterized by a few key features worth noting.<sup>106</sup> First, thanks to mass migration, particularly from countries of the Global South, “community” life in the metropolitan common-law countries is now highly cosmopolitan and may include social norms and notions of justice from all over the world.<sup>107</sup> Second, harms generated by both industrial and individual risk-taking are now, with the help of faster travel and communications, capable of more rapid and widespread impacts.<sup>108</sup> A privacy breach of the billing system at one retail chain store, we have recently seen, can lead to injury and claims among millions of people across a continent.<sup>109</sup> And finally, with the presence of information technology, parties can be quickly made aware of information that is

99. Larry Schwartz, *35 Soul-Crushing Facts About American Income Inequality*, SALON, (Jul. 15, 2015, 10:15 AM), [http://www.salon.com/2015/07/15/35\\_soul\\_crushing\\_facts\\_about\\_american\\_income\\_inequality\\_partner/](http://www.salon.com/2015/07/15/35_soul_crushing_facts_about_american_income_inequality_partner/) [https://perma.cc/E9GQ-N6DU].

100. See Drew Desilver, *5 Facts About the Minimum Wage*, PEW RESEARCH CENTER (Jul. 23, 2015), <http://www.pewresearch.org/fact-tank/2015/07/23/5-facts-about-the-minimum-wage/> [https://perma.cc/9R3A-VJSR] (noting that since the federal minimum wage was last raised in 2009, “the federal minimum has lost about 8.1% of its purchasing power to inflation.”).

101. RHODE, *supra* note 4, at 32–34.

102. See *id.* at 3, 5.

103. See *id.* at 13.

104. In such instances, there is good reason to think lay individuals may overestimate costs. See *id.* at 32 (noting that “[o]ver four-fifths of surveyed Americans believe that litigation is too slow and too costly.”).

105. See *id.* at 3 (indicating legal representation is out of reach to 40 to 60% of middle class Americans).

106. See Katherine Beckett, *Crime and Control in the Culture of Late Modernity*, 35 LAW & SOC’Y REV. 899, 900–901 (2001) (discussing the study of crime and control as subjects “central to the social life of ‘late modern’ societies.”).

107. See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 448–49 (2002).

108. RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 4 (2007).

109. Charles Riley & Jose Pagliery, *Target Will Pay Hack Victims \$10 Million*, CNNMoney, (Mar. 19, 2015, 3:05 PM) <http://money.cnn.com/2015/03/19/technology/security/target-data-hack-settlement/> [https://perma.cc/7R3J-6WQ2].

both accurate and inaccurate regarding risk, injuries, and their own legal rights and liabilities.<sup>110</sup>

These features distinguish the current era from an earlier age—the one in which economic approaches to deterrence were first theorized by writers like Coase and Calabresi.<sup>111</sup> In the 1960s and 1970s when these scholars were writing, Western industrialized nations were indeed witness to complex, mass risk-taking, but the wider cultural (and thus normative) context in which this took place was not yet “globalized.”<sup>112</sup> Information about liability, meanwhile, was also more concentrated in the hands of experts.<sup>113</sup>

### B. *The Specter of Process*

With the advent of recent social and technological developments, the meaning of legal process may have grown more severe as indicated by several observations about legal culture. First, we have witnessed the birth and widespread reproduction of the phrase “lawyer up.” Lawyering up, most will recognize, is a popular culture term for retaining an attorney as the result of a particular dispute.<sup>114</sup> But its significance goes beyond this. The phrase is used both defensively (as in “I’m going to lawyer up”), and offensively (as in “*you* better lawyer up”).<sup>115</sup> Using a basic Internet search engine (Google) n-gram to chart occurrences of “lawyering up” in English language texts over the past few decades, one finds that the phrase begins making an appearance in 1995 and then increases in frequency by roughly 9000% by 2008 (Figure 1).<sup>116</sup>

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110. In England, this has been called “compensation culture,” although some argue rising awareness has not truly resulted in more litigation. See Emily Dugan, ‘*Compensation Culture is a Myth: Claims for Work-Related Injuries and Diseases Fall 60 Per Cent in a Decade*’, THE INDEPENDENT (July 31, 2013), <http://www.independent.co.uk/news/uk/home-news/compensation-culture-is-a-myth-claims-for-work-related-injuries-and-diseases-fall-60-per-cent-in-a-8738679.html> [https://perma.cc/A9QU-Z4DK].

111. See, e.g., GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

112. Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 650–51, 659–60 (2002).

113. Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses*, 18 YALE J. REG. 253, 269–70 (2001) (noting the value of an expert witness’ educational pedigree during testimony about alleged liability).

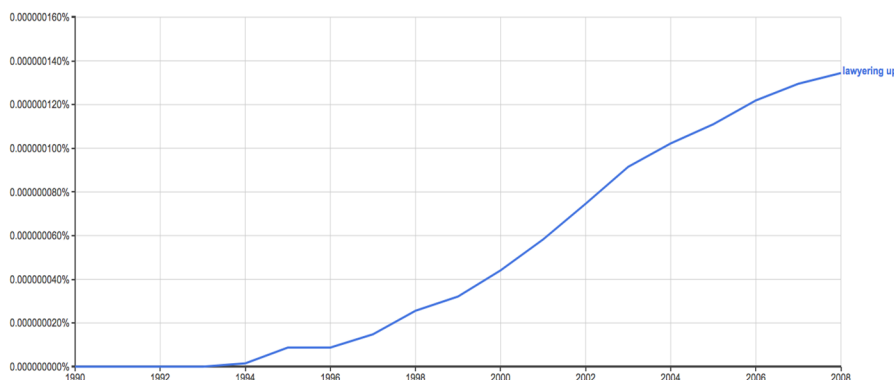
114. *Lawyer Up*, BLACK’S LAW DICTIONARY (10th ed. 2014).

115. *Id.* See generally Walter Goodman, *Good Cop vs. Bad Cop: Which Image Is Real?*, N.Y. TIMES, Feb. 23, 1995, at C18 (“What really spooks the honest, hard-working, likable, routinely successful detectives on ‘N.Y.P.D. Blue’ is the prospect of a suspect ‘lawyering up.’ The detectives cajole and threaten to keep the probable perp from exercising his right to counsel, because once a sharp lawyer appears the client will say nothing and the audience will be deprived of the confession that climaxes so many episodes.”).

116. N-Gram for “Lawyering Up,” GOOGLE BOOKS NGRAM VIEWER, <http://books.google.com/ngrams/> (graph the phrase “lawyering up”; between 1990 and 2008; smoothing of 3).



Figure 1



This example confirms the seemingly increased importance of retaining a lawyer within the English-speaking lay culture. But one might also hypothesize that the *reason* for this increase could be associated with greater awareness about the severity of initiating legal process itself. This severity, too, may have increased with the problem of access to justice referenced above.

In addition to “lawyering up,” the problem of *travel* for litigation may be a second feature of the modern civil justice system that makes process more immediately deterrent than liability.<sup>117</sup> Recent decades have seen the rise of large, multinational corporations offering contract-based services to more and more small consumers.<sup>118</sup> Examples of conflict from these arrangements are easily found across transactions with cellular phone service providers,<sup>119</sup> Internet or cable television providers,<sup>120</sup> and athletic gym operators among other things.<sup>121</sup> In each of these industries, corporate revenues depend upon the enforcement of thousands of small-value form agreements that some experts describe as contracts of adhesion for their nonnegotiability and inherently disparate bargaining positions between parties.<sup>122</sup> Tucked neatly into most of these agreements, among many other things, are forum selection clauses that require the consumer hoping to pursue a claim against the company to travel to the latter’s preferred geographic location for formal

117. Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 446 (1992) (“The deterrent effects of geography are numerous and weighty. The threshold task of merely retaining counsel in a distant location, which may seem routine to attorneys and judges, is profoundly daunting to ordinary people.”).

118. George S. Geis, *Business Outsourcing and the Agency Cost Problem*, 82 NOTRE DAME L. REV. 955, 958, 961–62 (2007); Trevor W. Nagel & Elizabeth M. Kelley, *The Impact of Globalization on Structuring, Implementing, and Advising on Sourcing Arrangements*, 38 GEO. J. INT’L L. 619, 619–20 (2007).

119. AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).

120. Mark Hamblett, *Consumer Suit Over Internet Contract May Go Forward*, N.Y. L.J., Apr. 13, 2015, <http://www.newyorklawjournal.com/id=1202723226786/Consumer-Suit-Over-Internet-Contract-May-Go-Forward> [https://perma.cc/WQ4N-QYAR].

121. Stelluti v. Casapenn Enters., 975 A.2d 494 (N.J. Super. Ct. App. Div. 2009).

122. Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 630 (2002).

hearings.<sup>123</sup> Meanwhile, as these contractual clauses have grown more frequent, so too has the risk that consumers will be harmed by products and services originating in geographic locales both nationally and internationally remote. Widespread awareness of the challenges posed by this geographic distancing between plaintiff and defendant may or may not be present, but the reality of travel as an increasingly requisite burden when initiating legal process for tort injury is virtually undeniable today.

Finally, beyond the greater severity of lawyer retention and spatial distancing, the legal process may have taken on added significance due to the increased costs of litigation itself.<sup>124</sup> While detailed information about average billing practices among small firms and solo attorneys is lacking, information about large U.S. firms indicates attorney fee rates were increasing before the Great Recession,<sup>125</sup> and that those have resumed rising every year since 2010.<sup>126</sup> But perhaps more universal has been a notable rise in the cost of discovery in civil disputes.<sup>127</sup> This has been in part attributable to the sheer increase in discoverable materials created in the age of digital information and communications.<sup>128</sup> In many cases, large corporate entities are able to use this vast volume of information offensively by overwhelming smaller opponents with a deluge of e-documents to sift through.<sup>129</sup> A 2008 survey of American trial lawyers found this growing trend to be increasingly cost-prohibitive for many of their clients.<sup>130</sup> While on the one hand the general public may not yet be aware of these recent developments in the civil justice system, individuals will likely confront these issues upon attempting to “lawyer up.”

The above paragraphs have described three ways in which legal process has grown in economic severity to make the comparative significance of liability less uniquely threatening for the general public. These developments, I have suggested, were in part the result of wider social and technological developments, and in part the result of structural changes and corrections in the legal services industry itself.

123. This also assumes prior participation in binding arbitration, which is also frequently a contractual prerequisite to pursuing these kinds of claims in a formal legal tribunal.

124. Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 867–69. See generally *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 817 (D.C. Cir. 2009) (“The total amount [Office of Federal Housing Enterprise Oversight] spent on the individual defendants’ discovery requests eventually reached over \$6 million, more than 9 percent of the agency’s entire annual budget.”).

125. Katelyn Polantz, *Billing Rates Rise, Discounts Abound: A 10 Percent Increase is Offset by Price Cuts*, NAT’L L.J., Jan. 5, 2015, <http://www.nationallawjournal.com/id=1202713809557/Billing-Rates-Rise-Discounts-Abound> [<https://perma.cc/8G5H-QNBD>].

126. *Id.*

127. Martha Neil, *Litigation Too Costly, E-Discovery a ‘Morass,’ Trial Lawyers Say*, A.B.A. J., Sept. 9, 2008, [http://www.abajournal.com/news/article/litigation\\_too\\_costly\\_e\\_discovery\\_a\\_morass\\_trial\\_lawyers\\_say](http://www.abajournal.com/news/article/litigation_too_costly_e_discovery_a_morass_trial_lawyers_say) [<https://perma.cc/N2NV-RQU6>].

128. *Id.*

129. The Am. Coll. Trial Lawyers Task Force on Discovery & The Inst. for the Advancement of the Am. Legal Sys., INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE AND IAALS (2008).

130. *Id.*

But legal process held special social significance well before the recent fluctuations. As prior writings have already suggested, independent of the economic burdens of a formal lawsuit, resort to legal process offensively or defensively has been shown in various contexts to carry heavy social meaning.

Three such meanings worthy of emphasis here are *process as privilege*, *process as burden*, and *process as shame*. These interpretations are not exclusive of others, but they are ones whose recurrence in the academic literature makes them particularly useful to this discussion. Experts describing legal process in these respective ways participate in what Erving Goffman famously described as “framing,” wherein aspects of human experience are given meaning by virtue of the context and language through which they are articulated.<sup>131</sup> Explaining how framing applies to political and legal culture, political scientist John Medearis has written, “[T]he designation ‘frame’ indicates an element of an individual’s or a group’s thinking that serves to order the rest, taking priority over new experience or argument, and, for this reason, remaining relatively insulated from it. Concretely, frames highlight certain problems, guide causal attributions and blame, and place facts within a narrative.”<sup>132</sup>

In the first framing, *process as privilege*, legal process has been styled by some as a form of civil right worthy of due process protection.<sup>133</sup> Advocates of this view have argued that although many tort scholars claim this area of law supports corrective justice—the righting of private wrongs—what it in fact does is simply create a right to seek redress for those wrongs.<sup>134</sup> Some have responded that this view is not fully distinguishable from the corrective justice approach, but the main civil recourse theorists, John Goldberg and Ben Zipursky, have insisted on the distinction.<sup>135</sup> Meanwhile, in what is likely a public affinity for this view rather than a direct indication of public influence by its proponents, signs of a popular belief in the civil right to legal process abound in the popular culture and its embrace of the phrase “having one’s day in court.” In the celebrated HBO documentary *Hot Coffee*, for example, plaintiff Jamie Leigh Jones is shown testifying before a congressional committee on the practices of her former employer and Iraq War contractor Kellogg, Brown, and Root (KBR).<sup>136</sup> In one of the most dramatic moments of the film,

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131. ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 10–11 (Ne. U. Press 1986) (1974).

132. John Medearis, *Social Movements and Deliberative Democratic Theory*, 35 BRIT. J. POL. SCI. 53, 57 (2004).

133. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 529 (2005).

134. *Id.* at 606.

135. See Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U.L. REV. 107, 108 (2011).

136. Alleging rape and sexual harassment at the hands of KBR employees overseas, Jones was forced to submit her claim to binding arbitration per her employment contract with the company. Jones argued that the required dispute settlement process removed her right to seek legal redress before a judge and jury, and the case was portrayed in *Hot Coffee* as a strong example of the dangers in permitting individuals to bargain away their right to legal process. While not portrayed explicitly in support of civil

Jones testifies stoically that, “Four years to fight to get in court is not a day in court.”<sup>137</sup>

Under a second framing, legal process has often been styled as a significant *burden* for people. This burden is often captured in uses of the phrase “dragged through the courts.” In one recent occurrence, the American football player Tom Brady has been described as getting “dragged through the courts” for his involvement in a ball-deflating incident during the 2014 Super Bowl.<sup>138</sup> In another, drivers passing through small municipalities dependent upon traffic fines for local revenue have been described as being “dragged through the courts” of towns far from home.<sup>139</sup> In still another example, legal experts have criticized the Department of Education’s Office for Civil Rights for its practices related to on-campus sexual assault in higher education.<sup>140</sup> Under new policies, they said, victims “would not have the resources and grit to endure being dragged through the courts for years.”<sup>141</sup> In each of these cases, the apparent idea latent in the phrase “dragged through the courts” is that there are contexts in which legal process (a privilege to be fought for and defended in the prior framing) is (in this framing) an onerous burden on innocent defendants.

In one final framing, legal process is often popularly associated with *shame*. Here, shame can be understood in terms of the classic, albeit sometimes criticized, anthropological dichotomy of honor versus shame.<sup>142</sup> Shame, in this regard, can be understood not as an individual emotional state but as the absence of social honor or prestige.<sup>143</sup> When it comes to encounters with legal process, one finds cases where shame is registered either by plaintiffs for their recourse to litigation, or by defendants for their being implicated as targets of litigation.<sup>144</sup>

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recourse theory, the example—and indeed the larger tenor of the film—parallels what scholars have said about the proper rights-based functioning of the tort system. *See* HOT COFFEE (HBO June 27, 2011). Jones’ case was later heard in a Texas federal court in *Jones v. Halliburton Co.*, 625 F. Supp. 2d 339 (S.D. Tex. 2008).

137. *Id.*

138. Bill Hall, *Artist Captured the Real Brady—A Deflated Man*, THE NEWS TRIBUNE (Aug. 21, 2015), <http://www.thenewstribune.com/opinion/opn-columns-blogs/article31882182.html> [<https://perma.cc/96QT-GNNW>].

139. Editorial Board, *The Problem is Bigger Than Ferguson*, N.Y. TIMES, Mar. 13, 2015, at A28.

140. Ashe Schow, *Members of Civil Rights Commission Oppose ‘Disregard For Rule Of Law’ Over Campus Sexual Assault Rules*, WASH. EXAMINER (Mar. 2, 2015, 10:26 AM), <http://www.washingtonexaminer.com/members-of-civil-rights-commission-oppose-disregard-for-rule-of-law-over-campus-sexual-assault-rules/article/2560906> [<https://perma.cc/KZX3-FLVR>].

141. *Id.*

142. *See* Michael Herzfeld, *Honour and Shame: Problems in the Comparative Analysis of Moral Systems*, 15 MAN 339, 341 (1980).

143. *Id.*

144. David Engel’s 1987 piece, “The Oven Bird’s Song,” is a keen example. The author studied a county in rural Illinois with a notable customary aversion to litigation in cases of personal injury. In an area where people knew their neighbors, most were able to settle disputes informally and for small sums of money, if any. But community members noted a perceived rise in litigation with the arrival of newcomers associated with industrial agriculture and new manufacturing operations. Living in the county without the same history and relationships as the host population, new arrivals injured by

For transnational comparison, scholars have noted similar aversion to court-based legal process in Japan.<sup>145</sup> There, being named in a lawsuit often means an individual or corporation has been unable or unwilling to settle with its adversary in available, informal dispute resolution channels.<sup>146</sup> Socially averse to open confrontation, Japanese society has looked unfavorably upon parties forced to litigate, and for this reason encourages defendants to settle under threat of negative publicity.<sup>147</sup> This form of defendant-side shame has fostered a thriving ADR community in Japan, and has been one factor in the maintenance of relatively few lawyers, and thus a highly selective bar admission process.<sup>148</sup>

These three framings of legal process as privilege, burden, and shame are, of course, in many ways contradictory. Yet the contradictions they present are not counterproductive. Here, I have suggested not that litigation is properly construed in any one of these ways, but rather that its competing critical framings are indicative of profound significance in the life of legal subjects. Far from incidental—from being merely the pathway to liability as optimal deterrence theory has so far treated it—litigation becomes itself a more severe process with heavy symbolic weight exerted over participants on both sides of any dispute. The threat it represents, the “specter of process” as I have called it here, is therefore far from severable from the specter of liability that optimal deterrence has thus far emphasized.

#### IV. BEHAVIOR

In addition to an assumption about the symbolic primacy of liability, theorists of optimal deterrence have harbored an assumption about human behavior. They hold, in short, that people would naturally respond to the specter of liability by adopting the required relevant marginal safety precaution.<sup>149</sup>

##### A. Behavioral Assumptions

This belief in a natural response to liability requires several subsidiary assumptions. First, it requires that information about the new decisional law pass in complete form outward into public knowledge. Second, it assumes that this information be received evenly by the relevant public to recalibrate individual

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industrial equipment or other individuals were forced to utilize the formal court system to seek redress. Often, Engel notes, they did so *because of*, rather than in spite of, their outsider status. Litigation, in Engel’s study of small town America, therefore, became a symbol for social outsidership and precarity. David M. Engel, *The Oven Bird’s Song: Insiders, Outsiders, and Personal Injury in an American Community*, in *LAW AND COMMUNITY IN THREE AMERICAN TOWNS* 27 (Carol J. Greenhouse et al. eds., 1994).

145. Tony Cole, *Commercial Arbitration in Japan: Contributions to the Debate on “Japanese Non-Litigiousness,”* 40 N.Y.U. J. INT’L L. & POL. 29, 32 (2007).

146. *Id.*

147. *Id.* at 82–84.

148. UGO A. MATTEI ET AL., *SCHLESINGER’S COMPARATIVE LAW: CASES, TEXT, MATERIALS* 268–269, 664–66 (7th ed. 2009).

149. See Goldberg, *supra* note 133, at 608.

valuations of cost and benefit.<sup>150</sup> And finally, it requires that individuals uniformly make decisions based on rational balancing between costs and benefits.

A number of difficulties with these assumptions are readily identifiable today. First, information about new legal holdings often does not travel far and wide.<sup>151</sup> Although it may do so in discrete industries with professional associations and trade publications, it likely encounters problems for individual conduct like automobile driving or social media commentary—activities whose lay participants are not part of an insular industrial community, and yet whose negligent performances in the aggregate may be capable of generating costs comparable to the industrial and mass product torts of high capitalism.

Second, individuals respond differently to the same stimuli. For many, the option to exercise greater care is not even a matter of choice. As John Goldberg writes,

Obviously, a fundamental premise of the deterrence model is that legal sanctions are capable of deterring. As some enterprise liability theorists have argued, however, there may be a good deal of tortious conduct that comes in the form of momentary lapses that may not be deterrable. More generally, the available evidence suggests that actors do not respond to liability with anything like regularity. This observation does not support a global condemnation of prescriptive economic deterrence theory, but it does suggest that economists need to recognize the limits of economic analysis, which only operates in realms, and with respect to actors, who can plausibly be supposed to respond to legal sanctions.<sup>152</sup>

Finally, the subassumption of “rational choice” has long been called into question.<sup>153</sup> Although a world full of calculating, rational individuals makes for tidy mathematical reductions of human behavior, many have questioned how readily this perspective captures the spontaneous realities of decision making among prospective tortfeasors.<sup>154</sup> Whereas tort disputes may include cases of heavy machinery operators who intentionally skip routine maintenance checks,<sup>155</sup> they also often include cases of lay drivers who make a sudden miscalculation,<sup>156</sup> or passionate young teens who spontaneously decide to send a text message while

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150. See Samuel L. Bray, *Announcing Remedies*, 97 CORNELL L. REV. 753, 755–56 (2012).

151. *Id.* at 758.

152. Goldberg, *supra* note 83, at 558.

153. MICHAEL SLOTE, *BEYOND OPTIMIZING: A STUDY OF RATIONAL CHOICE* 6 (1989).

154. Goldberg, *supra* note 83, at 559. (“An important dilemma facing economic analysis at the moment concerns the extent to which it is desirable for the analyst to relax the strict assumption of individual rationality so as to make economic models of behavior more realistic. Integrating cognitive psychology and social norm theory holds out the promise of making economic analysis more nuanced by expanding what can count as costs and benefits, and by considering how cognitive biases cause actors to distort information about those costs and benefits. However, as a result, the analysis may become even more indeterminate and less capable of generating predictions about the effects of sanctions on behavior.”).

155. *Moyer v. United Dominion Indust., Inc.*, 473 F.3d 532 (3d Cir. 2007).

156. *Shaver v. Smith*, 200 S.W. 8 (Ky. Ct. App. 1918).

driving (despite clear law prohibiting this).<sup>157</sup> The behavioral assumption, requiring each of the three subsidiary assumptions challenged here, has been historically coupled with the focus on liability. And together, these two predicates have permitted optimal deterrence theorists to conclude that selection among various liability options will have one or another specific impact on risk taking behavior in the future. For reasons now stated, both assumptions about human responses to liability are open to challenge.

Already, economists and medicine scholars have shown this to be the case in “defensive medicine,” wherein physicians alter their clinical practices not for fear of adverse judgment but for fear of costly legal defense.<sup>158</sup> As access to legal representation falls out of reach of more and more people,<sup>159</sup> and as the popular culture circulates stark messages about the burdens of litigation,<sup>160</sup> it is reasonable to think that individuals would begin to respond in ways that doctors already have been. Indeed, lay persons, perhaps informed by tort reformist backlashes against costly “frivolous claims,”<sup>161</sup> may be far more cognizant about the certain financial and temporal burdens of litigation—even when successful—than they likely are about the practical subtleties of success by demurrer, summary judgment, jury verdict, or directed verdict. Regarding areas of social behavior that may have been recently or long settled, informational distribution about changes in the legality of the conduct in question may be slow or lacking.<sup>162</sup> And, even if new cases are known to prospective defendants, the implications of doctrinal shifts—such as how in the prospective process such shifts would exonerate them—may not be. What this Article suggests, then, is that there will be many cases, particularly outside industrial

157. Associated Press, *David And Linda Kubert, Injured by Texting-While-Driving Teen, Settle Lawsuit*, HUFFINGTON POST, [http://www.huffingtonpost.com/2012/08/21/david-linda-kubert-texting-driving\\_n\\_1820316.html](http://www.huffingtonpost.com/2012/08/21/david-linda-kubert-texting-driving_n_1820316.html) [https://web.archive.org/web/20140307124151/http://www.huffingtonpost.com/2012/08/21/david-linda-kubert-texting-driving\_n\_1820316.html] (last updated Aug. 22, 2012).

158. David A. Katz et al., *Emergency Physicians' Fear of Malpractice in Evaluating Patients With Possible Acute Cardiac Ischemia*, 46 ANNALS EMERGENCY MED. 525, 526 (2005). It is notable that in the case of physicians the “opportunity cost” of time spent in litigation are extremely high.

159. Gillian Hadfield, *Lanyers, Make Room for Nonlawyers*, CNN (Nov. 25, 2012), <http://www.cnn.com/2012/11/23/opinion/hadfield-legal-profession/> [https://perma.cc/FMH8-LBKB].

160. See, e.g., Robert A. Kagan, *How Much Do Conservative Tort Tales Matter?*, 31 LAW & SOC. INQUIRY 711, 715 (2006); James R. Copland, Opinion, *Time to Cut New York's Sky-High Litigation Costs*, NEW YORK POST, (Feb. 1, 2015 1:44 AM), <http://nypost.com/2015/02/01/time-to-cut-new-yorks-sky-high-litigation-costs/> [https://perma.cc/SF8J-CTW6]; Ross Eisenbrey, *Tort Costs and the Economy: Myths, Exaggerations, and Propaganda*, ECONOMIC POLICY INSTITUTE, (Nov. 20, 2006), <http://www.epi.org/publication/bp174/> [https://perma.cc/NHP5-8APJ].

161. RYAN BRANNAN, TEX. PUB. POL. FOUND., RETURNING JUSTICE TO THE JUDICIAL SYSTEM: PROCEDURAL PROTECTIONS FROM FRIVOLOUS LITIGATION 1 (2011), <http://www.texaspolicy.com/library/doclib/2011-04-PP03-LosersPays-rb.pdf> [https://perma.cc/c/5ELS-BNPR].

162. See, e.g., The Crimson Staff, Opinion, *Making the Law Accessible: We applaud the Law School's push to digitize its catalogues*, HARV. CRIMSON (Nov. 4, 2015), <http://www.thecrimson.com/article/2015/11/4/staff-law-school-digitization/> [https://perma.cc/U6WU-DUVN].

activity, where the specter of liability should be low, but the specter of process—fear of litigation—remains high.

### B. *Precedent Behaviorism: Legal Realism*

To better appreciate this, optimal deterrence theorists would be well advised to embrace the interpretivist potential of the behavioral approach espoused by some of the classic Legal Realists.<sup>163</sup> That approach, interested in the way human behavior receives, makes sense of, and acts upon legal information, affords necessary intellectual capacity to consider the specter of process as an important source for deterrence.

Legal Realism is widely understood to have emphasized the importance of pragmatism and social engineering in dispute resolution and rule creation.<sup>164</sup> Although cross-fertilization between American and Scandinavian variants is evident, the essential goal of each was, of course, slightly different. Scandinavian Legal Realism emphasized the need to purge law of metaphysical abstraction to make way for empirical jurisprudence, while the American school took aim at specious formalism.<sup>165</sup> But even the coherence of the American “school” has long been called into question.

As John Schlegel and others have said, there are multiple “stories” of American Legal Realism.<sup>166</sup> One of these sees it as a movement in legal education. Scholars at Columbia, responding to provocation emerging internally from Professor Herman Oliphant, and externally from rapid growth at Harvard, attempted a massive curriculum reform seeking to promote a more socially embedded study of law to supplant the abstract, doctrinal approach initially developed by Langdell.<sup>167</sup> That story “ends,” however, with many of these Columbia faculty leaving for the judiciary and other academic posts, and therefore less with a pop and more with a fizzle.<sup>168</sup>

The dominant narrative considers Legal Realism to have been a direct reaction against legal formalism that had been dominating U.S. common law thinking in the years since the American Civil War.<sup>169</sup> Legal formalism purportedly claimed to apply naturally occurring principles in scientific fashion to ever-new fact patterns separated from the messiness and complexity of everyday social life.<sup>170</sup> As legal positivism emerged, scholars relaxed their faith in God-given natural law to allow

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163. Behaviorism is certainly not coterminous with Legal Realism, and is rather better understood as—along with jurisprudence—one among several of its “doings.” See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 8 (1995).

164. Howard Erlanger et al., *Is it Time for a New Legal Realism?*, WIS. L. REV. 335, 356–58 (2005).

165. MICHAEL MARTIN, *LEGAL REALISM: AMERICAN AND SCANDINAVIAN* 1 (1997).

166. SCHLEGEL, *supra* note 163, at 15.

167. *Id.*

168. *Id.* at 19–20.

169. William W. Fisher III et al., *Introduction* to *AMERICAN LEGAL REALISM* xi, xii (William W. Fisher III et al. eds., 1993).

170. *Id.*



that Western legal principles had been developed and “put there” by Man himself.<sup>171</sup> Nevertheless, both naturalist and positivist backgrounds for legal formalism assumed with respect to legal rules that “there is a *there* there.”

In response, the dominant narrative goes, American Legal Realism questioned whether distanced application of rules to facts really explained the way cases were decided, or if it did, whether this was appropriate to modernizing, urban society.<sup>172</sup> Codified rules seemed, the early Realist teachers suggested, to favor extant power relations and the propertied class.<sup>173</sup> Judicial decisions, they continued, seemed to reflect legal reasoning grafted onto policy pronouncements in a manner that speciously concealed judges’ fingerprints on the holdings they were creating.<sup>174</sup> Acceptance of this, some felt, was nothing to be fearful of and, indeed, could permit principled social engineering at a time in American expansion, urbanization, and industrialization, when policy was ever more worthy of discussion.<sup>175</sup> But several challenges have emerged in response to the dominant narrative. Was Legal Realism simply a theory of adjudication—about judicial reasoning rather than a general theory of law? Was it really simply a reaction to formalism and, in turn, a clean break from it? And if Realism considered law to be shaped by social forces, what extralegal epistemologies would it really embrace in studying this?

The legal philosopher H.L.A. Hart argued that Legal Realism was rule-skeptical and, therefore, insoluble with his own positivism which believed that while rules may be contingent upon social values, they are observable and influential on outcomes.<sup>176</sup> Responding to this, Brian Leiter has written that Realism and positivism are not neatly opposed, and that Realism rather presupposes a positivist theory of law.<sup>177</sup> Hart, he says, was mistaken about Realism’s essential aims. It is not a theory of law but simply a theory of adjudication.<sup>178</sup>

Yet apart from this rule-skepticism question, some have said that Legal Realism was much more than a theory of judicial thinking.<sup>179</sup> One key feature of that discussion has been the important social scientific approach to law espoused by many of the Realists. As discussed below, several of Realism’s key thinkers, from Pound to Llewellyn to Frank, felt an accurate portrayal of law required a functionalist approach that could be borrowed from the social sciences in rapid

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171. *Id.* at xii–xiii. This gender specificity is retained here in light of the contemporary power dynamics of the period.

172. *Id.* at 164.

173. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 17 (1910). (“The malefactor of means, the rogue who has an organization of rogues behind him to provide a lawyer and a writ of *habeas corpus* has the benefit of the law in the books.”).

174. Fisher III et al., *supra* note 169, at 165.

175. *Id.* at 165–66.

176. LEITER, *supra* note 6, at 59–60 (citing Hart on the incommensurability of Realism and Positivism).

177. *Id.* at 60.

178. *Id.*

179. See e.g., SCHLEGEL, *supra* note 163 at 4–6.

development during the early twentieth century, particularly at some of the same academic institutions that housed the Realists themselves.<sup>180</sup>

The second debate is over whether Realism truly represents a break from formalism. Brian Tamanaha has masterfully attacked this problem arguing that several key premises on which the “break” narrative is based have been overstated.<sup>181</sup> His argument has been that the group of scholars referred to as “Legal Realists” were not iconoclastic anti-formalists but rather “balanced realists.”<sup>182</sup>

Balanced Realism has two integrally conjoined aspects—a skeptical aspect and a rule-bound aspect. It refers to an awareness of the flaws, limitations, and openness of law, an awareness that judges sometime make choices, that they can manipulate legal rules and precedents, and that they sometimes are influenced by their political and moral views and their personal biases (the skeptical aspect). Yet it conditions this skeptical awareness with the understanding that legal rules nonetheless work; that judges abide by and apply the law; that there are practice-related, social, and institutional factors that constrain judges; and that judges render generally predictable decisions consistent with the law (the rule-bound aspect).<sup>183</sup>

The dominant narrative, Tamanaha says, has unduly emphasized rule skepticism.<sup>184</sup> In similar fashion, Leiter has described the “received view” of Legal Realism’s approach to law as one separated from the formal structures of legal doctrine, and rather determined most by sociological circumstances.<sup>185</sup> After Jerome Frank, perhaps the most behaviorist of the Realists, Leiter calls this the “Frankified” view.<sup>186</sup> He then calls for a restoration of Realism as a “naturalized jurisprudence”—as a theory of adjudication that must correspond to empirical observations from the social and physical sciences.<sup>187</sup>

While the question of whether or not Legal Realism represents a true rupture from the past is an important one, its resolution is not an essential feature for the revised theory of deterrence aimed for in this Article. Whether consonant or dissonant with precedent legal theory, Legal Realism invariably carried distinct interest in law’s relationship with neighboring disciplines and their epistemologies. While it may not, and should not, be reducible to those other modes of inquiry, it was undeniably interested in them.<sup>188</sup> This interest stemmed from an emphasis

180. One of Llewellyn’s influences was the groundbreaking anthropologist Franz Boas, mentor to his collaborator E. Adamson Hoebel at Columbia University. See William Twining, *The Idea of Juristic Method: A Tribute to Karl Llewellyn*, 48 U. MIAMI L. REV. 119, 128 (1993).

181. BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE (2010).

182. *Id.* at 6.

183. *Id.*

184. *Id.*

185. LEITER, *supra* note 6, at 17.

186. *Id.*

187. *Id.* at 21. Though “naturalism” is an awkward label here because of its easy confusion with natural law.

188. Michael Steven Green, *Legal Realism As Theory of Law*, 46 WM. & MARY L. REV.

among the classic Realists on the role of facts *in* adjudication, and facts *about* it.<sup>189</sup> In other words, whereas true formalist judges respond primarily to the stimulus of rules, Realist reasoning was driven heavily by the factual details of cases.<sup>190</sup>

The importance of facts went beyond adjudication in individual cases. It served to allow lawyers and scholars to predict legal outcomes based upon the social profile of the judge and factual similitude to previous cases.<sup>191</sup> This predictive interest leads to one of the more interesting controversies about Realism. While some, particularly in response to Critical Legal Studies, feel Realism's interest in extralegal resources to be fluff, or unduly complicated, there is a strong case to be made that interest in the social contingency of rule application to facts is *more*, rather than less, practical.<sup>192</sup> Understanding that adjudication and rule development do not take place in a vacuum, the classic Realists asked us to consider social contingency and social impact for the pragmatic reason that, like it or not, these may determine outcomes. "A judicial decision," wrote Felix Cohen, "is a social event."<sup>193</sup>

Given this, one of the fields that most interested the Realists was public policy.<sup>194</sup> Its use in Realistic jurisprudence is identified by the premise that judges arrived at decisions based upon an independent policy intuition, and that these decisions are then justified by selecting and selectively interpreting the applicable rule of law.<sup>195</sup> This approach came to the classic Realists via early teachers like Columbia professor Munroe Smith who "took the view, as did Holmes and the later legal realists, that law is the product of contests over social and individual interests, and that the essential purpose of law is to advance 'public policy.'"<sup>196</sup>

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1915, 1927 (2005).

189. *Id.* at 1927–1928.

190. LEITER, *supra* note 6, at 24. This is what Leiter calls the "Core Claim" of Legal Realism. *Id.* at 21.

191. MARTIN, *supra* note 165, at 30.

192. Erlanger et al., *supra* note 164.

193. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935), reprinted in AMERICAN LEGAL REALISM 212, 223 (William W. Fisher III et al. eds., 1993).

194. Neil B. Cohen & Spencer Weber Waller, *Taking Pop-ups Seriously: The Jurisprudence of the Infield Fly Rule*, 82 WASH. U.L.Q. 453, 453, 463 (2004).

195. MARTIN, *supra* note 165, at 32 (writing on Oliphant's belief in juridical intuition).

196. Tamanaha, *supra* note 181, at 74.

C. *Behaviorism and the Challenges to Formalism: The Disciplines*

Related to the emphasis on policy-driven adjudication was the Realist interest in extralegal theories and methods. In particular, several of the marquee Legal Realists stressed the importance of understanding human action and reaction through the behavioral sciences.<sup>197</sup> As Michael Martin has said, the Realists' "critical rethinking involved the scientific investigation of legal behavior in general and judicial behavior in particular and was justified pragmatically and contextually. The attempt to make the law scientific, in order to predict and explain it, made attention to legal behavior crucial."<sup>198</sup> This view is directly reflected in writings from Pound, Llewellyn, Frank, Cook, and Moore.<sup>199</sup> As Llewellyn himself wrote

[T]he most significant (I do not say the only significant) aspects of the relations of law and society lie in the field of *behavior*, and that words take on importance either because and insofar as they are *behavior*, or because and insofar as they demonstrably reflect or influence other *behavior* . . . [f]or all that, it reverses, it upsets, the whole traditional approach to law. It turns accepted theory on its head.<sup>200</sup>

As likely understood at the time, the study of behavior was the province of "behaviorism," an emergent approach in psychology dedicated to studying human thought and emotion not from the "inside" as psychologists had been attempting to do, but rather as a response to stimuli from the social and natural environment in which human consciousness exists.<sup>201</sup> Understandings of the human mind, therefore, could only be achieved through the study of behavioral response.

Pound, later dissociated from the Realists internally for his dispute with Llewellyn, may have inspired this interest in behaviorism early on.<sup>202</sup> For Pound, human psychology would be an important source for knowledge about "law in action."

Another mode of approach to jurisprudence, often asserted to be the one path to reality, is psychological. Psychological exposure of the role of reason in human behavior, of the extent to which so-called reasons come after action as explanations instead of before action as determining factors, has made a profound impression upon the rising generation of jurists.<sup>203</sup>

This early interest in psychology was later greatly supported in the work of Jerome Frank.<sup>204</sup> Frank, a University of Chicago J.D. who had himself undergone psychoanalysis, published *Law and the Modern Mind* in 1930 to a sensational

197. MARTIN, *supra* note 165, at 30.

198. *Id.*

199. *Id.*

200. Llewellyn, *supra* note 10, at 56.

201. Inanna Hamati-Ataya, *Behavioralism*, in INT'L STUDIES COMPENDIUM 2 (2012).

202. William W. Fisher III et al., AMERICAN LEGAL REALISM, 49–51 (William W. Fisher III et al. eds., 1993).

203. Pound, *supra* note 173, at 63 (responding to Llewellyn and characterizing the features of Legal Realism movement).

204. See JEROME FRANK, LAW AND THE MODERN MIND (Anchor Books 1963) (1930), *reprinted* in AMERICAN LEGAL REALISM 205 (William W. Fisher III et al. eds., 1993).

reception.<sup>205</sup> There, Frank argued that individual judicial psychology was one of the most determinative factors in adjudication.<sup>206</sup> The legal academic study of psychology, therefore, was for Frank a logical development.

Our law schools must become, in part, schools of psychology applied to law in all its phases. In law schools, in law offices and law courts there must be explicit recognition of the meaning of the phrase “human nature in law.”<sup>207</sup>

Frank also noted the changing role for legal education as law scholars grew more attuned to the contingency of legal reasoning.<sup>208</sup> This concept of adjudication as psychologically, rather than merely socially, contingent led some to caricature Legal Realism as a study of “what the judge had for breakfast.”<sup>209</sup> Others more sensitive to its place within a broader intellectual movement have come to describe it as the “idiosyncratic wing” of Realism.<sup>210</sup> But the purpose of this psychological branch of the behavioral turn was not to foreclose the possibility for predicting outcomes: it was rather to seek out patterns in the way outcomes were decided even where those patterns required extralegal observation.<sup>211</sup>

Out of psychological behaviorism emerged a new approach to political studies that would call itself *behavioralism*.<sup>212</sup> Whereas behaviorism in psychology had replaced the study of internal, subjective motivation and intention with research on external, behavioral stimuli and response, behavioralism in politics sought to further constrain its methodology to objective, scientific techniques and apply these to political behavior.<sup>213</sup> This importation, moreover, may have served a pragmatic role in political science. With the onset of the Cold War, some within American political science sought to distance themselves from “social science” for its contemporary conflation with “socialism.”<sup>214</sup> The advent of behavioralism permitted these scholars to frame their work, for grant-funding purposes, as “behavioral” rather than “social science.”<sup>215</sup> Political science behavioralism, therefore, was the objective study of political behavior emphasizing scientific methods and establishing

205. ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* 45 (1985).

206. See FRANK, *supra* note 204, at 205.

207. JEROME FRANK, *LAW AND THE MODERN MIND* 156 (Anchor Books 1963) (1930).

208. Cohen, *supra* note 193, at 218 (“Courses in our more progressive law schools are beginning to treat, most gingerly, of the psychological doctrines embedded in our rules of evidence, the sociological theories assumed in our criminal law, the economic assumptions embalmed in our doctrines of constitutional law, and the psychological, sociological, and economic *facts* which give force and significance to rules and decisions in these and other fields of law.”).

209. RONALD DWORKIN, *LAW'S EMPIRE* 36 (1986).

210. LEITER, *supra* note 6, at 28.

211. *Id.* at 62 (describing Oliphant).

212. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 633 n.2 (1999).

213. Hamati-Ataya, *supra* note 201, at 1.

214. *Id.* at 2–3.

215. *Id.* at 3, 5; see also LEITER, *supra* note 6, at 65.

“facts.”<sup>216</sup> Naturally, with the emphasis on behavioral patterns as “facts,” both behaviorism and behaviorism would resonate with the fact-heavy approach of the Legal Realists.<sup>217</sup>

But beyond psychology and political science, behavior was also a key object of study for a growing movement within Anglophone cultural anthropology.<sup>218</sup> With origins in the late nineteenth century, early anthropology was the study of “primitive” cultures that Victorian society had grown familiar with through colonization and preoccupied with as a foil for its own repressed sexuality, violence, and superstition.<sup>219</sup> Its emergence, like the other “social” sciences, more importantly, seemed to track the rise of Legal Realism.<sup>220</sup> Credited as an influential proto-Realist, Oliver Wendell Holmes, for example, had cited heavily to E.B. Tylor on primitivism in *The Common Law*.<sup>221</sup> Tylor’s groundbreaking idea of cultural “survivals” influenced Holmes’ thinking on the power of pre-formalized legal norms in the West.<sup>222</sup>

Within anthropology, a significant shift was occurring in the interwar years from documenting and ordering primitive cultures at a distance—what had been called armchair anthropology—toward operationally understanding the ways in which local cultures functioned on the ground.<sup>223</sup> This new *functionalism* seemed also to track the rise of a functionalist interest in law espoused first by Pound’s “law in action” and later by the Realism of legal educators like Herman Oliphant.<sup>224</sup> Karl Llewellyn, meanwhile, “saw his behavioral position as being of a piece with modern ethnology,” which substituted objective description of a cultural practice “for a local *report* of what a practice is.”<sup>225</sup>

Anthropological functionalism arose in two forms between the two World Wars.<sup>226</sup> The first was “structural-functionalism” developed in England by A.R. Radcliffe-Brown, who suggested that social structures had emerged to serve the function of reproducing the social system in what was essentially a feedback loop.<sup>227</sup>

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216. Hamati-Ataya, *supra* note 201, at 6–7.

217. *Id.* at 6.

218. GEERT HOFSTEDE, CULTURE’S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS 13 (Jim Brace-Thompson et al. eds., 2d ed. 2001).

219. JOHN W. GRIFFITH, JOSEPH CONRAD AND THE ANTHROPOLOGICAL DILEMMA: ‘BEWILDERED TRAVELLER’ 25 (Christopher Butler et al. eds., 1995).

220. SCHLEGEL, *supra* note 163, at 1.

221. MARTIN, *supra* note 165, at 15.

222. *Id.* at 15–16.

223. THIEMO BREYER, ON THE TOPOLOGY OF CULTURAL MEMORY: DIFFERENT MODALITIES OF INSCRIPTION AND TRANSMISSION 64 (2007).

224. See Pound, *supra* note 173, at 15. See also SCHLEGEL, *supra* note 163, at 15 (describing Herman Oliphant at Columbia in the 1920s); MARTIN, *supra* note 165, at 34–35 (on Llewellyn).

225. MARTIN, *supra* note 165, at 34.

226. See George W. Stocking, Jr., *Radcliffe-Brown & British Social Anthropology*, in FUNCTIONALISM HISTORICIZED: ESSAYS ON BRITISH SOCIAL ANTHROPOLOGY 131, 156 (George W. Stocking et al. eds., 1984).

227. See *id.* at 131, 156–57.

The functionalism of Bronislaw Malinowski, meanwhile, focused on the instrumental needs to which social practices and institutions functioned as solutions.<sup>228</sup> In developing this approach, Malinowski would also pioneer a fieldwork methodology that placed the researcher in the social “field” for extensive periods of time to study in-depth the way culture was practiced and lived by “natives.”<sup>229</sup> Study at this level of depth allowed Malinowski to argue, in effect, that culture was a psychological response to common physiological and environmental need.<sup>230</sup> While not always characterized in this fashion, we might further suggest that this was the anthropological equivalent of behaviorism in psychology.<sup>231</sup>

Llewellyn’s interest in cultural anthropology has been well documented and widely cited.<sup>232</sup> It manifested in his collaboration with the Boasian anthropologist E. Adamson Hoebel and in their field research into Cheyenne and other tribal legal systems.<sup>233</sup> But while Llewellyn espoused the functionalist theoretical approach of Malinowski, he did not faithfully reproduce the immersive fieldwork method the latter had innovated.<sup>234</sup>

This period would become the zenith of law-anthropology relations.<sup>235</sup> In the following years, the latter saw a return to “structuralism” and thus a move away from the psychological functionalism of the interwar period.<sup>236</sup> Under the influences of French theorist Claude Levi-Strauss—exiled in the Americas for some of this period—anthropology returned to an interest in cultural mapping but with the added influence of European linguistic theory and philosophy.<sup>237</sup> Culture, many now said, was not strictly about ensuring the functioning of society but about expressing Man’s place within nature and cosmology through a universe of symbols—especially words—that could all only be understood in relation to each other.<sup>238</sup> This linguistic turn may have alienated Realist-inspired academic lawyers

228. See *id.* at 162.

229. See *id.* at 165–66.

230. See *id.* at 174.

231. See Robert A. LeVine, *Behaviorism in Psychological Anthropology*, in CONCEPTS OF PERSONALITY 361, 362 (Joseph M. Wepman & Ralph W. Heine eds., 1963).

232. See LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* 30–32 (2006); Annelise Riles, *Property as Legal Knowledge: Means & Ends*, 10 J. ROYAL ANTHROPOLOGICAL INST. 775, 785 (2004); Riaz Tejani, *Little Black Boxes: Legal Anthropology and the Politics of Autonomy in Tort Law*, 11 U.N.H.L. REV. 129 (2013).

233. Karl N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (1941), as reprinted in AMERICAN LEGAL REALISM 251 (William W. Fisher III et al. eds., 1993).

234. See *id.* at 251. While Llewellyn & Hoebel did conduct substantial fieldwork for this text, they did not execute the immersive, long-term fieldwork Malinowski had pioneered in the Trobriand Islands.

235. See *id.*

236. See CLAUDE LÉVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 1 (Claire Jacobson & Brooke Grundfest Schoepf trans., 1963).

237. See *id.* at 34–35.

238. See *id.*

for whom the philosophy of language was less meaningful than the pragmatic uses of it.<sup>239</sup>

One final watershed in twentieth century cultural anthropology would alter its epistemological landscape in a manner relevant to this discussion. Beginning in the late 1960s, the anthropologist Clifford Geertz began writing that language was not simply a means to express what people see and do: it was the only means by which people could interpret the world around them.<sup>240</sup> If nature, society, history, and religion could only be conceived in and of language, Geertz seemed to convincingly say, then all of human culture operated like language.<sup>241</sup> Human behavior, then, functioned like text; it could be written, read, reread, and reinflected.<sup>242</sup> It responded, most importantly, to readings and rereadings of others' behavior.<sup>243</sup>

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239. *See id.* at 35–36.

240. GEERTZ, *supra* note 8, at 3, 14.

241. *See id.* at 14–16.

242. *See id.* at 10, 17.

243. *Id.*



## V. PROCESSUAL DETERRENCE

Here then, is the key point. The interpretive approach to behaviorism in late twentieth century anthropology—space for which was already carved out by the Legal Realists—may be of immense value to a revised theory of optimal deterrence in tort law. Taking into account the contemporary specter of process, the revised theory may be said to include *processual deterrence*, the degree to which the behavior of legal subjects may be shaped ex ante by the fear of simply being implicated in the burdensome process of litigation irrespective of the likelihood (perceived or actual) of liability. Interpretivism, construed here as a subset of behaviorism borrowed from cultural anthropology, is one approach to studying this.<sup>244</sup> To its critics, interpretivism is simply the “reading” of social symbols and cues from afar.<sup>245</sup> It encourages, those critics would say, a high-altitude observation and conclusion about what any given symbol or practice “means” to the researcher.<sup>246</sup> For legal scholars, even those hospitable to the Legal Realist interest in behaviorism, this is probably too subjective. Documenting what a symbol or practice means to the outside observer cannot be confused with objective science. Distance alone is not objectivity.

But to practitioners of interpretivism, this was never the approach’s purpose or strength.<sup>247</sup> For Geertz and his students, interpretive anthropology sought to document *local* interpretations of cultural practices, institutions, and beliefs.<sup>248</sup> It was, as he famously wrote, like “reading over the shoulders” of native informants.<sup>249</sup> This claim would come into question in later years when many of those same students would realize their own inscriptions were merely sedimented interpretations, and some would embrace this reflection on inscription as the new textualist anthropology for the “post-modern age.”<sup>250</sup> But, in the decades since, the wider discipline has returned to a view that there is a “Real world” to document—one in which gross injustice and great beauty somehow coexist.<sup>251</sup>

For the Realists, the value of interpretation was already relevant in the interwar period.<sup>252</sup> Llewellyn, for example, described the new enterprise as “the gathering and interpretation of facts about legal behavior.”<sup>253</sup> Despite his claims to legal scientism, therefore, he incorporated to a degree the notion that “facts” about law and legal systems did not stand on their own and rather required proper framing by

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244. See *id.* at 16–17, 20.

245. See *id.* at 16–17.

246. See *id.*

247. See *id.* at 30.

248. See *id.* at 22–23.

249. CLIFFORD GEERTZ, *Deep Play: Notes on the Balinese Cockfight*, in *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS BY CLIFFORD GEERTZ* 412, 452 (1973).

250. See JAMES CLIFFORD, *Introduction: Partial Truths to WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* 1, 2–3 (James Clifford & George E. Marcus eds., 1986).

251. See Martin Paleček & Mark Risjord, *Relativism and the Ontological Turn Within Anthropology*, 43 *PHIL. SOC. SCI.* 3 (2012).

252. See Llewellyn, *supra* note 10, at 55–56.

253. *Id.* at 57.

legal academics that could ostensibly develop more accurate interpretive approaches through fieldwork.<sup>254</sup>

Law and Society scholars—and their theoretical relatives—have long said this. For Durkheim, law was a symbol of social solidarity that grew in complexity and pervasiveness as societies became modernized.<sup>255</sup> But, as some have said, his view does not equate to a simple formulation of law as *representative* of moral values.<sup>256</sup> This possibility of a disconnect between law's legitimacy and law's action becomes the focal point for later legal ethnography. "Law's power," writes Carol Greenhouse, "is what it does, exposing the ambiguity of its moral legitimacy."<sup>257</sup> Similarly, for Malinowski, law's significance is derived from broader social norms.<sup>258</sup> In his study of tribal islanders in the South Pacific, and somewhat to the surprise of Western jurists, unwritten rules relating to criminality and exchange had the same normative thrust as formal Western law.<sup>259</sup> As Greenhouse says of these observations, "legal norms have no binding force of their own; it is other social forces that align norms with feelings, such that acting in accordance with norms takes on a positive valence—when it does."<sup>260</sup>

The alignment of "norms with feelings" is important for understanding deterrence only insofar as this alignment manifests in behavior. People may feel that a rule of law speaks to them in an emotional or affective sense, but if they proceed to act contrary to that response, then law has not served its social control function. Perhaps realizing this important step, legal ethnography has moved away in recent decades from trying to understand how law shapes conscience and solidarity toward studying how it manifests in human practices.<sup>261</sup> As detailed above, the interest in practices among social and human sciences can be attributed to several key writers.<sup>262</sup> Chief among those writers' goals was a critical confrontation with what had come to be known as *structuralism*. Structuralism, as developed by anthropologist Levi-Strauss building on the linguistic theory of Roman Jakobson, viewed culture as a complex web of symbols defined always in relation to other symbols.<sup>263</sup> For critics like Pierre Bourdieu, this understanding of culture as structure was

254. See *id.* at 57–58.

255. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 25 (W.D. Halls trans., 1984).

256. Carol J. Greenhouse, *Law, in A COMPANION TO MORAL ANTHROPOLOGY* 432, 434, 443 (Didier Fassin ed., 2012).

257. *Id.* at 443.

258. *Id.* at 434.

259. BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 17, 31–32 (C.K. Ogden ed., 1966); Greenhouse, *supra* note 256, at 343–35.

260. Greenhouse, *supra* note 256, at 434.

261. Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141, 141–42 (2006); Greenhouse, *supra* note 256, at 443; Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347, 357–59 (1995).

262. See PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (Richard Nice trans., 1977); Felix S. Cohen, *supra* note 193; LEVI-STRAUSS, *supra* note 236.

263. See, e.g., LEVI-STRAUSS, *supra* note 236.

woefully—particularly after the tumultuous 1960s—devoid of time, history, and politics.<sup>264</sup>

But this attack on the formalism of accepted cultural theory in post-war Europe and America had an interesting precursor in the thought of classic Legal Realists like Felix Cohen. If postwar social theorists had fallen into the trap of viewing culture in static, mappable forms, prewar Legal Realists like Cohen were taking issue with the static formalism of law as “legal science.”<sup>265</sup> Cohen felt that meaning emanating from any given judicial decision was a function of the conduct it set into motion.<sup>266</sup> This conduct included official state conduct required to enforce the judgment, but it also included the practical response of everyone touched by the case. Writing against the so-called legal formalism of the day, Cohen believed that the traditional “scientific” approach to law belied its human dimensions and contingencies.<sup>267</sup> “Legal science, as traditionally conceived,” he wrote in 1935,

[A]ttempts to give an instantaneous snapshot of an existing and completed system of rights and duties. Within that system there are no temporal processes, no cause and no effect, no past and no future . . . . A legal system, thus viewed, is as far removed from temporal activity as a system of pure geometry. In fact, jurisprudence is as much a part of pure mathematics as is algebra, unless it be conceived as a study of human behavior,—human behavior as it molds and is molded by judicial decisions. *Legal systems, principles, rules, institutions, concepts, and decisions can be understood only as functions of human behavior.*<sup>268</sup>

This critique, predating Bourdieu’s attack on structuralism by roughly a half-century, voiced several of the same critical concerns: the lack of temporality, the hegemony of heuristic snapshots, and the specious appeal of apparent geometric models.<sup>269</sup> But most significantly, it reasserted the role of behavioral studies for proper understanding of law’s meaning through doing.<sup>270</sup>

If law as such has been envisioned as a behavioral concept by both classic social theorists and classic Legal Realists, legal theorists today may remain unconvinced. On at least some level, law must include the written or otherwise formalized precepts accepted to govern a community or society.<sup>271</sup> But, at the end of the day, any inquiry into wealth generating (and other) uses of law must deal not only with written pronouncements, but also the ramification of those in the minds of legal subjects. In other words, the most relevant feature of law for social engineering purposes is its deterrence function, and this is inherently behavioral in

264. BOURDIEU, *supra* note 262, at 4–5.

265. Cohen, *supra* note 193, at 218.

266. *Id.* at 224.

267. *Id.*

268. *Id.* (emphasis added).

269. BOURDIEU, *supra* note 262, at 3–4; Cohen, *supra* note 193, at 227.

270. Cohen, *supra* note 193, at 224.

271. Pound, *supra* note 26, at 44–46.

nature. So while the previous equation of law with behaviorism did not convince everyone, the deep necessity of a revised behaviorist approach today should.

### CONCLUSION

Deterrence is a behavioral concept, not a legal one. To capture it we must know how legal conceptions and misconceptions are taken up into individual patterns of action. Moreover, we must understand how subjective meaning influences this uptake, and how it changes over time and social space.

Optimal deterrence has been one of the theoretical successes of law and economics over the past half century. As an approach to tort liability, it has gained considerable influence and become naturalized as one of the primary policy functions embraced by academics and taught to first-year law students. As elaborated by an implicit goal of wealth maximization, it forms a simple, unambiguous approach to explaining outcomes of civil disputes both locally and globally.

But as a predictive theory, optimal deterrence has suffered from a failure to explain how liability will in fact influence social behavior. Operating largely from the assumption of rational choice, it envisions a world in which liability outcomes translate directly and evenly into general deterrence.

This Article has advocated for two interrelated corrections to this. The first has been an embrace of behaviorism like that initially proposed by the classic Realists including Frank, Llewellyn, and Cohen among others. Behavior, those scholars taught us, is an essential component to understanding legal systems. But second, this discussion has emphasized the need for an updated behaviorism that takes seriously the late twentieth century interpretivism first developed in the field of cultural anthropology and later absorbed widely across the social sciences. Not yet informed by this movement, at least some of the Realists nonetheless seem to have anticipated it.

The revised interpretive, behaviorist approach sheds important light on optimal deterrence. If social control depends upon what rules mean to people, what rules mean to people is likely shaped by the host of variables that make up their unique “realities.” In the contemporary period of privatization and increased inequality, wealth and class are two very important examples of this. To the extent these can determine capacity to absorb the burdens of litigation, they may likewise be shifting the locus of social control from fears of liability to fears of legal process. Far from affronting law and economics, observations of this kind should be viewed as constructive. Processual deterrence, like many contemporary sociolegal problems, is also an invitation to greater transdisciplinary collaboration.

